

**Internal Revenue Service**  
**memorandum**

CC:TL:TS  
WEBERMAN/lcr

date: **JUN 26 1986**

to: District Counsel, Richmond MA:RCH

from: Director, Tax Litigation Division CC:TL

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subject: The "Makes or Furnishes" Requirement

This will confirm oral technical advice provided to Keith Fogg of your office. He inquired as to the Office's position regarding the applicability of the "makes or furnishes" requirement of section 6700 in several situations.

Section 6700 provides a penalty for organizing or participating in the sale of abusive tax shelters. The penalty is imposed against any person who "makes or furnishes (in connection with such organization or sale)" a false statement or a gross valuation overstatement (GVO). In United States v. Turner, 601 F. Supp. 757, 759, 767, 768 (E.D. Wis. 1985) the court indicated that mere involvement in an abusive tax shelter, including a statement that the shelter was legal, did not suffice to meet the "makes or furnishes" requirement for a GVO case. The promoter, a Mr. Swan, was one of the four partners who set up the shelter, knew that the shelter assets were overvalued, was available for consultation with investors and informed one investor the shelter was legal but did not explain the operations or make a statement of value to investors. As is discussed below, the Service will not follow Turner in certain situations, if the promoter knew the relevant facts about the shelter. In this connection, the statement of Judge Kenyon in United States v. H.L. Schwartz, Civ. No. 84-5497 (C.D. Cal.) in a March 10, 1986, hearing (copy attached) supports the government's position that a GVO made personally to investors is unnecessary to establish liability.

It is emphasized that with respect to computation of the section 6700 penalty, if the \$1,000 per sale method is utilized, an administrative cap of the gross amount received is in effect. See LGM 7059.1 CHG 87. Our position as to the assertion of the penalty in the different situations Mr. Fogg posed is as follows.

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### Situation 1

#### Facts

A salesman provides his secretary offering memoranda for abusive tax shelters to which his business card is stapled. In accordance with his instructions, the secretary distributes them to physicians located in a medical office building. One physician sends the salesman funds for one unit of the shelter.

#### Position

Furnishing investors with an offering memorandum, in which a GVO is made, constitutes the making or furnishing of a GVO. The salesman is liable for the penalty. The secretary is only liable if she is paid a commission on the sale; if she is not, her having engaged solely in a clerical or mechanical act does not rise to the level of participation in the sale necessary for imposition of the penalty.

### Situation 2

#### Facts

During a presentation by a salesman, the director of sales enters the room and informs the investor that the shelter, which contains a GVO, "is legal."

#### Position

Regardless of whether the receipt of compensation is based on a per sale basis, the director has participated in the sale of each investment. Accordingly, a separate penalty may be asserted with respect to his participation in each sale which results from the meeting. Moreover, the organizational penalty should also apply to his compensation for promoting the shelter. Notwithstanding Turner, the Service's position is that the endorsement of the shelter in this context contains a GVO, i.e., there is an implicit statement that the valuation utilized in the shelter is correct, because, were the valuation not correct, the shelter would not be legal.

### Situation 3

#### Facts

The director of the sales staff of an abusive shelter, who has been involved in the structuring of the shelter and knows it contains a GVO, furnishes offering memoranda to five salesmen, who each sell units of the shelter. The director does not communicate with his staff, or the investors, regarding the merits of the shelter.

Position

The director has assisted in the organization and participated in the sale of an abusive tax shelter and has furnished a GVO. Specifically, the furnishing of the offering memoranda constitutes the furnishing of a GVO, and the fact that the statement was not furnished directly to investors does not affect assertion of the penalty, notwithstanding Turner. A person who is involved in the structuring of the shelter and knows it contains a GVO cannot insulate himself from liability by utilizing a tier arrangement to conduct sales. Accordingly, the director is subject to the section 6700 penalty for his organizational activity as well as his sales activities. Moreover, whether or not the director is paid on a per sale basis, the penalty for sales participation should be based on the greater of \$1,000 per sale by the salesmen or a percentage of gross income. The furnishing of offering memoranda by the salesmen to investors may be imputed to the director.

Situation 4

Facts

Individual A owns 600 worthless master recordings. He provided to six individuals located in different cities 1) packages of incorporation materials; 2) partnership packages; and 3) sample ITC passthrough forms. The individuals each formed a corporation. A then sold each of the corporations master recordings for a small amount of cash and a large note. Each corporation then leased the master recordings to partnerships, passing through the ITC.

Position

A has assisted in the organization and participated in the sale of abusive tax shelters and has furnished GVOs. In the context of his other activities, selling the master recordings for inflated amounts constituted GVOs. The section 6700 penalty for participation in sales should be the greater of 600 \$1,000 penalties or a percentage of A's gross income derived from the activity. A should be assessed the greater of a percentage of gross income or a \$1,000 penalty with respect to each sale to an investor since he has participated in each sale.

Situation 5

Facts

Attorney B renders a legal opinion which does not opine as to the value of an asset which has been grossly overvalued but indicates the factors to be utilized in valuing property and

states the tax effects if the value stated by the promoter is correct. The attorney also renders a second legal opinion for a second shelter which utilized overvalued property in which he states that it is more likely than not that substantially all tax benefits will be allowed. In both cases, the attorney agrees that the opinion may be published in the offering memorandum.

Position

With respect to the first opinion, the attorney has made or furnished a statement, but not a GVO. With respect to the second opinion, by opining that the tax benefits will be allowed he has made a GVO because the conclusion implicitly treats the valuation as correct. Moreover, the penalty should be based upon the greater of a percentage of gross income, or \$1,000 for each sale plus the organizational penalty. It is the position of this office that the furnishing of the legal opinion which the attorney agreed could be provided to investors constitutes a separate sales participation activity with respect to each investor to whom it was furnished. We are currently litigating the issue in Sibbison v. United States, Civ. No. 85-4540-ER(Bx)(C.D. Cal).

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By:

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